

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

11 HEIDI CHIAT, an individual, ) 3:16-cv-00328-HDM-WGC  
12 Plaintiff, )  
13 vs. ) ORDER  
14 ELKO COUNTY SCHOOL DISTRICT, a )  
governmental entity, STEVE COOK, )  
15 an individual, LYNN MANNING JOHN, )  
an individual, JEFF ZANDER, an )  
16 individual, and MIKE SMITH, an )  
individual,  
17 Defendants.  
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19 Before the court is defendants Elko County School District  
20 ("ECDS"), Steve Cook, Lynn Manning John, Jeff Zander, and Mike  
21 Smith (collectively "defendants") motion for summary judgment (ECF  
22 No. 27). Plaintiff has responded (ECF No. 30) and defendants have  
23 replied (ECF No. 33) to plaintiff's response. The defendants'  
24 motion is therefore ripe for judgment.

Plaintiff sued ECSD and four individual administrators, alleging federal Constitutional and state law claims relating to her First Amendment rights and protected speech. In addition to

1 ECSD, plaintiff has named various members of ECSD and the Owyhee  
2 Combined School ("OCS") including (1) OCS vice principal Lynn  
3 Manning John, (2) OCS principal Steve Cook, (3) ECSD superintendent  
4 Jeff Zander, and (4) ECSD deputy superintendent Mike Smith.

5 Plaintiff alleges one retaliation claim under 42 U.S.C. § 1983  
6 arguing that she was subjected to an adverse employment action  
7 because of her constitutionally protected speech (ECF No. 1  
8 (Complaint)). Plaintiff also alleges a state law claim for  
9 tortious discharge. *Id.* Defendants have moved for summary  
10 judgment on both of plaintiff's claims.

11 **I. Background**

12 **A. Plaintiff's employment and licensure**

13 Plaintiff commenced the Nevada teacher license application  
14 process with the Nevada Department of Education ("NDE") in  
15 September 2015 in preparation for an interview for a teaching job  
16 in Elko, Nevada (Def. Mot. Summ. J. Ex. 3 (Deposition of Heidi  
17 Chiat)). On September 22, 2015, plaintiff was offered a contract  
18 to teach fifth-grade at OCS (Def. Mot. Summ. J. Ex. 4). Plaintiff  
19 accepted the employment offer in a letter received by ECSD on  
20 September 30, 2015 (Def. Mot. Summ. J. Ex. 5).

21 The September 22 contract offer states that it was made  
22 "pending receipt of a copy of your certification for the state of  
23 Nevada and receipt of official transcripts in [the ECSD  
24 superintendent's] office . . . final approval by the Board of  
25 Trustees." (Def. Mot. Summ. J. Ex. 4). On October 28, 2015,  
26 plaintiff was advised by the NDE in an email that:

27 Your application for an initial K-8 Elementary license has  
28 been evaluated and does not currently meet the minimum  
requirements. The license you applied for is a core

1 teaching area and the requirements below must be met before  
2 a license may be issued: Praxis II Elementary. . . . You do  
3 not have a valid [Nevada] educator license until these  
4 steps are taken and you receive confirmation that the  
5 license has been issued. Your non-refundable fee and  
application are valid through November 29, 2015. If you do  
not provide the required information prior to that date you  
will need to submit a new application, new fingerprint card  
and new application fee.  
(Def. Mot. Summ. J. Ex. 6).

6 On March 18, 2016, defendant Smith notified plaintiff by  
7 letter that her conditional employment with ECSD would be  
8 terminated. In that letter, quoting NRS 391.120(3), defendant  
9 Smith stated "it is unlawful for the board of trustees of any  
10 school district to employ any teacher who is not legally qualified  
11 to teach all the grades which the teacher is engaged to teach."  
12 (Def. Mot. Summ. J. Ex. 12). NRS 391.120(3) further provides that  
13 "the board of trustees shall suspend or terminate, as applicable,  
14 the employment of any teacher who fails to maintain a license." At  
15 the time of her termination, plaintiff had failed to meet the  
16 minimum requirements to be licensed as a teacher in Nevada and no  
17 license had been issued to the plaintiff by the state of Nevada.  
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19 **B. Alleged protected speech and adverse employment action**

20 In her complaint, plaintiff claims that "[p]rior to a negative  
21 evaluation received by Plaintiff on February 29, 2016, Plaintiff  
22 had complained up her chain of command regarding efforts by  
23 Defendant John and her family members to harass Plaintiff regarding  
24 her discipline and grading of students." (Complaint). Plaintiff  
25 further claims that her complaints "alleged favoritism by John of  
26 students that were related to John by blood." *Id.* Plaintiff  
27 asserts that her complaints of favoritism and harassment constitute  
protected speech.  
28

1 Plaintiff also claims that she engaged in protected speech  
2 when she reported to defendants Cook and Zander, the Federal Bureau  
3 of Investigation, and the Bureau of Indian Affairs rumors that "an  
4 underage student was having an affair with a teacher at" OCS  
5 (Complaint).

6 Plaintiff alleges she suffered adverse employment actions in  
7 the form of a negative evaluation and termination as a result of  
8 her protected speech in violation of 42 U.S.C. § 1983 and Nevada  
9 state law.

10 **II. Legal standard**

11 Summary judgment shall be granted "if the movant shows that  
12 there is no genuine issue as to any material fact and the movant is  
13 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).  
14 The burden of demonstrating the absence of a genuine issue of  
15 material fact lies with the moving party, and for this purpose, the  
16 material lodged by the moving party must be viewed in the light  
17 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*  
18 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141  
19 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one  
20 that affects the outcome of the litigation and requires a trial to  
21 resolve the differing versions of the truth. *Lynn v. Sheet Metal*  
22 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*  
23 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

24 Once the moving party presents evidence that would call for  
25 judgment as a matter of law at trial if left uncontested, the  
26 respondent must show by specific facts the existence of a genuine  
27 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
28 250 (1986). "[T]here is no issue for trial unless there is

1 sufficient evidence favoring the nonmoving party for a jury to  
2 return a verdict for that party. If the evidence is merely  
3 colorable, or is not significantly probative, summary judgment may  
4 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla  
5 of evidence will not do, for a jury is permitted to draw only those  
6 inferences of which the evidence is reasonably susceptible; it may  
7 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585  
8 F.2d 946, 952 (9th Cir. 1978).

9 **III. Analysis**

10       **A. Section 1983 First Amendment retaliation**

11       "[T]he First Amendment protects a public employee's right, in  
12 certain circumstances, to speak as a citizen addressing matters of  
13 public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126  
14 S.Ct. 1951, 164 L.Ed.2d 689 (2006). However, "while the First  
15 Amendment invests public employees with certain rights, it does not  
16 empower to 'constitutionalize the employee grievance.'" *Id.* at 420,  
17 126 S.Ct. 1951 (quoting *Connick v. Myers*, 461 U.S. 138, 154, 103  
18 S.Ct. 1684, 75 L.Ed.2d 708 (1983)).

19       In *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), the Ninth  
20 Circuit articulated a five-factor test for evaluating First  
21 Amendment Retaliation claims. Initially the claimant "bears the  
22 burden of proof at trial of showing (1) that she spoke on a matter  
23 of public concern; (2) that she spoke as a private citizen rather  
24 than a public employee; and (3) that the relevant speech was 'a  
25 substantial or motivating factor in the adverse employment  
26 action.'" *Coomes v. Edmonds School Dist. No. 15*, 816 F.3d 1255,  
27 1259 (9th Cir. 2016) (quoting *Eng*, 552 F.3d at 170-71). If the  
28 plaintiff satisfies the first three *Eng* factors, "the burden of

1 proof shifts to the government to show that (4) 'the state had an  
2 adequate justification for treating the employee differently from  
3 other members of the general public'; or (5) 'the state would have  
4 taken the adverse employment action even absent the protected  
5 speech.'" *Id.* (quoting *Eng*, 552 F.3d at 170-72).

6       *Eng's* factors must be met in order for a plaintiff to succeed  
7 on her claim and "a reviewing court is free to address a  
8 potentially dispositive factor first rather than addressing each  
9 factor sequentially." *Id.* at 1260. As such, the court will focus  
10 on the second, fourth, and fifth *Eng* factors.

11       For purposes of First Amendment protection, the "critical  
12 question . . . is whether the speech at issue is itself ordinarily  
13 within the scope of an employee's duties, not whether it merely  
14 concerns those duties." *Lane v. Franks*, --U.S.--, 134 S.Ct. 2369,  
15 2379, 189 L.Ed.2d 312 (2014). "Thus, to the extent that  
16 [plaintiff's] speech was within the scope of her employment duties,  
17 such speech is not protected by the First Amendment." *Coomes*, 816  
18 F.3d at 1260.

19       Whether plaintiff spoke as a private citizen or a public  
20 employee is a mixed question of fact and law. *Id.* Plaintiff's job  
21 responsibilities as a teacher at OCS is a question of fact and the  
22 constitutional implication of those facts is a question of law.  
23 *Id.* "If [plaintiff's] speech owes its existence to [her] position  
24 as a teacher, [she] spoke as a public employee, not as a citizen."  
25 *Id.* (internal quotation marks omitted) (second and third alteration  
26 in original).

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1           **1. Speech regarding inappropriate teacher and student**  
2           **relationship**

3           Plaintiff claims that she was retaliated against because she  
4 reported rumors of a sexual relationship between a student and a  
5 teacher at OCS. Defendants contend that plaintiff spoke regarding  
6 the inappropriate relationship as a public employee and such speech  
7 is thus unprotected. In support of their argument, defendants  
8 allege that, as a teacher, plaintiff is a mandatory reporter and  
9 had a legal duty to report the rumors about the relationship  
10 between the OCS student and teacher. Plaintiff responds that she  
11 is under no obligation to report "rumors" and those rumors "d[id]  
12 not trigger the basis for a belief the [student] was subjected to  
13 physical, mental or sexual abuse." (Pl. Resp. Mot. Summ. J.). The  
14 court finds plaintiff's argument unconvincing.

15          NRS chapter 432B requires teachers to report neglect and  
16 abuse, including sexual abuse.<sup>1</sup> Furthermore, the uncontested facts  
17 show that plaintiff believed she had a legal obligation to report  
18 the rumors of the inappropriate relationship. In fact, in her  
19 email communication with defendants, plaintiff specifically  
20 referred to herself as a "mandated reporter" and said she had no  
21 choice but to report the rumors of the inappropriate relationship  
22 (Def. Mot. Summ. J. Ex. 6). Other courts have held that reports  
23 made pursuant to an obligation as a mandatory reporter are  
24 unprotected under the First Amendment. See e.g. *Eugenio v. Walder*,

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<sup>1</sup>NRS 432B.220(1) (a) provides that a person employed by a public  
27 school "who, in his or her professional capacity, knows or has  
28 reasonable cause to believe that a child has been abused or neglected  
shall . . . report the abuse or neglect of the child to an agency  
which provides child welfare services or to a law enforcement agency."

1 No. 06-CV-4928 (CS) (GAY), 2009 WL 1904526, at \*9 (S.D.N.Y. July 2,  
2 2009) ("Plaintiffs' reports of suspected abuse to CPS are not  
3 constitutionally protected speech because Plaintiffs made those  
4 reports pursuant to their official duties and not as private  
5 citizens.")

6 Therefore, the court concludes that the undisputed facts  
7 establish that plaintiff spoke as a public employee and not as a  
8 private citizen when she reported an alleged inappropriate sexual  
9 relationship between the OCS student and a teacher. Thus,  
10 plaintiff's speech is not protected under the First Amendment.

11 **2. Speech regarding alleged favoritism and harassment**

12 Plaintiff claims that "prior to a negative evaluation in  
13 February 2016, Plaintiff jumped her chain of command regarding  
14 efforts by Defendant John to harass Plaintiff regarding her grading  
15 of students" and alleges that "[t]hese complaints alleged  
16 favoritism by John of Shoshone students who were related to John by  
17 blood over students not so related and/or of Paiute descent." (Pl.  
18 Resp. Mot. Summ. J.). Plaintiff argues that her "expressive  
19 activity took place away from her students and away from her  
20 classroom" and "therefore did not owe its existence to her job as a  
21 teacher." *Id.*

22 Defendants argue that plaintiff's speech was made pursuant to  
23 her job duties as a teacher and thus the speech owes its existence  
24 to plaintiff's public employment. In support of their argument,  
25 defendants point to various "Performance Responsibilities" that  
26 were part of the job posting for the position plaintiff was  
27 eventually hired to fill (Def. Mot. Summ. J. Ex. 15). According to  
28 the performance responsibilities, plaintiff was required to

1 maintain open lines of communication between students and parents,  
2 cooperate with other ECSD staff members, establish and maintain  
3 cooperative relations with others, maintain accurate, complete, and  
4 correct records, and assist the administration in upholding and  
5 enforcing rules, regulations, and policy. *Id.*

6 Plaintiff's communication to defendants on these issues  
7 relating to favoritism of members of the school and regarding her  
8 discipline and grading of students was within the scope of  
9 plaintiff's responsibilities as an educator and therefore was not  
10 made as a private citizen. See *Dorcely v. Wyandanch Union Free*  
11 *School Dist.*, 665 F.Supp.2d 178, 208-09 (E.D.N.Y.2009) ("Public  
12 employees who convey complaints or grievances about a matter  
13 pertaining to their official duties to their supervisors do so in  
14 their capacities as employees rather than citizens, even when the  
15 subject matter of their speech touches upon a matter of public  
16 concern, and therefore, such speech is not protected by the First  
17 Amendment.") (internal quotation marks and alteration omitted).

18 Because the undisputed facts establish that plaintiff's speech  
19 on the issue of alleged harassment, favoritism, discipline, and  
20 grading, was made as a public employee, rather than a private  
21 citizen, defendants are entitled to summary judgment on plaintiff's  
22 first claim for relief.

### 23 **3. Fourth and fifth Eng factors**

24 Finally, the court concludes that even if the plaintiff had  
25 presented sufficient evidence establishing triable issues of fact  
26 on her First Amendment claim that she spoke as a private citizen,  
27 the defendant has presented evidence that "the state had an  
28 adequate justification for treating the employee differently from

1 other members of the general public"; and "the state would have  
2 taken the adverse employment action even absent the protected  
3 speech." *Eng*, 552 F.3d at 170-72.

4 The parties do not dispute that plaintiff was not licensed as  
5 a teacher by the state of Nevada. The parties also do not dispute  
6 that ECSD explicitly made clear in its contract offer that  
7 plaintiff's continued employment was contingent upon plaintiff  
8 becoming a licensed teacher in Nevada. Thus, even if plaintiff had  
9 met her burden and satisfied the first three *Eng* factors,  
10 defendants have presented sufficient evidence that they both (1)  
11 had adequate justification for treating plaintiff differently from  
12 other members of the public, and (2) would have taken the adverse  
13 employment action even absent plaintiff's alleged protected speech.  
14 Therefore, there is no triable issue of material fact for trial and  
15 defendants are entitled to summary judgment on plaintiff's First  
16 Amendment claims.

17       **B. Tortious discharge**

18       Under Nevada law, "[a]n employer commits a tortious discharge  
19 by terminating an employee for reasons that violate public policy."  
20 *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1064 (1998).  
21 "[R]ecover for retaliatory discharge under state law may not be  
22 had upon a 'mixed motives' theory; thus, a plaintiff must  
23 demonstrate that the protected conduct was the proximate cause of  
24 his discharge." *Id.* at 1064 (emphasis in original). In other  
25 words, the protected activity must have been the sole proximate  
26 cause of the termination.

27       Here, plaintiff was informed that she was terminated because  
28 she failed to obtain a Nevada teaching license. Plaintiff was also

1 put on notice in her original offer from ECSD that her continued  
2 employment was contingent upon obtaining a Nevada teaching license.  
3 Finally, the NDE notified plaintiff that she was not in compliance  
4 with Nevada teaching licensure requirements. Thus, plaintiff has  
5 not shown that material issues of fact exist that would establish  
6 her alleged protected speech was the proximate cause of her  
7 termination and defendants are thus entitled to summary judgment on  
8 plaintiff's second claim for relief.

9 **IV. Conclusion**

10 Plaintiff has not produced evidence to create a genuine issue  
11 of material fact for trial in response to defendants' motion for  
12 summary judgment. Accordingly, defendants' motion (ECF No. 27) is  
13 **GRANTED** and judgment shall be entered in favor of defendants on all  
14 of plaintiff's claims.

15 IT IS SO ORDERED.

16 DATED: This 26th day of March, 2018.

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UNITED STATES DISTRICT JUDGE  
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